

No. 12,323.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EARL A. ERNST,

Appellant,

vs.

A. G. CLEMENS and H. G. McBRIDE, and A. G. CLEMENS
and H. G. McBRIDE, doing business as IDEAL MANU-
FACTURING COMPANY,

Appellees.

APPELLANT'S OPENING BRIEF ON REHEARING OF APPEAL.

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Chronology of Appeal.

This is a rehearing by this Honorable Court in accordance with its Order, dated September 14, 1951, granting appellant's Motion for Reconsideration of His Petition for Rehearing, which was denied by this Court on December 15, 1950, and thereby left standing this Court's affirmance of the Judgment of the District Court for the Southern District of California, Northern Division, in the Ninth Circuit, entered March 28, 1949.

Statement of the Case.

This case, as originally filed and tried by the District Court, was a Federal suit in equity for infringement of two United States Letters Patent, to wit: (1) United States Letters Patent No. 2,288,159, issued in the name of Fredrick J. Ernst to plaintiff-appellant, Earl Ernst, Administrator of said Fredrick J. Ernst, on June 30, 1942, for an invention in a Sacking Device, Plaintiff's Exhibit No. 1 [Tr. p. 46], and (2) United States Letters Patent No. Re. 22,740, issued to the plaintiff-appellant herein, Earl A. Ernst, on April 2, 1946, for an invention in a Sack Jigger, Plaintiff's Exhibit No. 2 [Tr. p. 46]. Said last named Letters Patent No. Re. 22,740, Plaintiff's Exhibit No. 2, is a reissue of plaintiff-appellant's United States Letters Patent No. 2,347,474, issued April 25, 1944, for an invention in a Sack Jigger, Plaintiff's Exhibit No. 2-A [Tr. p. 47].

After the decision of this case on appeal, by this Honorable Court, appellant, upon filing his first Petition for Rehearing, withdrew and excluded his Letters Patent No. 2,288,159 from his said petition and from this appeal, without waiving any of his rights under said patent, which he may still have, in order to shorten and simplify this appeal; and this rehearing is thereby limited to the question of infringement of appellant's United States Letters Patent No. Re. 22,740, by the accused Sack Jiggers of the defendants-appellees.

Appellant's invention, as covered by this United States Letters Patent in suit, No. Re. 22,740, is a practical and very successful machine which has been, and is now being, used successfully and extensively in the United States and in Canada [Tr. pp. 53-55] for receiving potatoes in sacks

mounted on a platform or jigger board 22, and for “jiggling” said sacks containing potatoes and thereby settling and packing down the potatoes in said sacks and thus sacking the potatoes for sale in the market.

Prior to appellant’s Sack Jigger machine, Patent No. Re. 22,740, potatoes and the like were *sacked by hand* [Tr. pp. 52-53], since none of said earlier sacking machines had a “*jigger board*” or any other *automatic means* for “jiggling,” settling and packing potatoes in sacks for the market. Consequently the earlier hand operated potato-sacking machines, *as exemplified in Plaintiff’s Exhibit No. 7*, were too slow [Tr. p. 90], and inefficient to meet the demand of the market [Tr. pp. 52-55].

Appellant’s Invention.

Appellant’s invention in suit, as embodied in Claim 1 of his Letters Patent, No. Re. 22,740, Plaintiff’s Exhibit No. 2, comprises a new machine, which includes a novel *jigger board* or *platform* indicated (22) in the specification and drawing in said letters patent in suit, and vibratory operating mechanism (58) mounted in a central frame unit or central locus of the machine, indicated (1), for reciprocating, or moving said jigger board horizontally lengthwise forwardly and backwardly for jiggling potatoes or the like in the sacks indicated (34) supported on said jigger board (22), which is operatively suspended from the frame (1 to 11, inclusive) of the machine at its ends, and at two points intermediate its ends, by hanger means, such as straps or links (23), which links are pivotally connected at their upper ends to a frame extension (24) and at their lower ends to said jigger board (22), as clearly shown in Fig. 1 of the

drawing of said patent in suit, No. Re. 22,740. The jigger board (22), as shown in said patent, is suspended by said links (23) at the front side edge of an endless horizontal conveyor belt 46, *parallel to and below said edge of said belt*, which belt travels over a pair of rollers 47 and 48, which rollers 48 are mounted in a bearings 50 (Fig. 3) in the central frame unit (1) of the machine, and which rollers 47 are mounted in bearings 49 on the end posts of an elongated side portion or extension 2 or 3 of the machine. It should here be noted that appellants, Sack Jigger, as illustrated in Figs. 1 and 2 of the patent in suit on appeal, No. Re. 22,740, may be divided into three parts, to wit: "a central portion 1 and elongated side portions or extensions 2 and 3. These side portions may be identical in construction and are identical in this form of the invention, but need not necessarily be identical. *One of the side portions (2 or 3) may be omitted entirely.*" (See first page, left column, lines 49 to 54, of the specification of said patent in suit.)

Since it is unnecessary to describe more than one of the two identical portions or extensions 2 and 3 of the invention in suit, *the portion or extensions 3 only, at the right side of the central portion or unit 1* will be described, omitting description of the identical left side portion 2 of the machine. The jigger board (22) is constructed with a series of cleats (28), secured to the upper side of said jigger board, across the same, in spaced relation to each other opposite the elongated side portion 3 of the machine, which spaced cleats (28) present a plurality of areas or stations on the jigger board (22) upon which cleats the bottoms of the sacks (34), respectively, are placed to be filled with potatoes or the like and the same compacted in said sacks as the jigger board (22) is reciprocated, as

hereinafter more fully described. Said cleats (28) also strengthen the jigger board and reduce the likelihood of its warping. The upper open ends of the sacks (34) are hung in U-shaped frame units 37 (Figs. 1, 2, 3, 5, 6, and 7) on hooks 36 of said frame units (Figs. 6 and 7) of the patent in suit No. Re. 22,740, which frame units 37 project forwardly from a *stationary* plank 12 of the upper front wall of the said portion 3 of the machine directly over the jigger board (22) (Figs. 1, 2, 3 and 5). The frame units 37 and the hooks 36 (Figs. 6 and 7) carried thereby are located slightly below the level of the upper reach of the conveyor belt 46 of the portion 3 at the right of the machine, and forwardly of the outer or front side edge of said belt, as clearly shown in Figs. 1, 2, 3, 5 and 7 of the drawings of the patent in suit, so that the potatoes on said upper reach of said conveyor belt 46 may be diverted forwardly therefrom by adjustable baffle plates or shearers 72, successively, over said outer or front side edge of said belt into said upper open ends of the sacks (34), successively, which sacks are supported on the jigger board (22) and held open at their upper ends by the sack frame units 37, respectively.

The jigger unit, or *vibratory mechanism or means* (58), referred to and included as an element in Claim 1 of the patent in suit, Re. No. 22,740, is mounted in the central frame unit or central open locus (1) of the machine covered by said patent, for moving the jigger board (22) lengthwise forwardly and backwardly horizontally, for jiggling said jigger board to settle and compact the potatoes in the sacks (34) on said jigger board, which jigger unit or vibratory means (58) is driven by an electric motor 67 mounted on the left side of said central frame unit (1) as shown in Figs. 1 and 3 of the draw-

ings of the patent in suit. A crank 56 (Fig. 2) is secured on the forward end of a shaft 53 driven by said motor 67, through pulleys and belts, which crank 56 is journaled in a plate 57 (Figs. 1 and 2) of a push and pull rod unit or "jigger" (58) (Figs. 1 and 2), which jigger unit includes a bar 59 (Fig. 1) secured at one end to said plate 57, and pivotally connected at its outer end at 61, to the upper end of the vertical arm 62 of an angle bracket 60, the horizontal arm 63 of which bracket is bolted to the jigger board (22). The plate 57 and the bar (59) connected to said plate and to said bracket 60 constitute the "*pitman*" referred to in claim 1 of the patent No. Re. 22,740 on which claim this suit is brought.

In operation, the unfilled sacks (34) are first placed upon the platform or jigger board (22), with the bottom of each sack resting upon said jigger board over a station cleat (28) and with the upper open end of each sack hung at its four corners on the four hooks 36 of a U-shaped frame unit 37. The cleats (28) provide separate stations for the potato sacks (34) in suitably spaced relation longitudinally along the platform or jigger board (22) and hold the bottoms of said sacks against slipping lengthwise on said jigger board, while the frame units 37 hold the upper ends of the sacks 34 in open position to receive the potatoes from the conveyor belt 46, through said upper open ends into said sacks. The motor 67, being turned on, the platform or jigger board (22) is reciprocated or moved forwardly and backwardly lengthwise thereof, by said motor 67, through the medium of the vibratory means (58) including the pitman 59 and bracket 60 connecting the left or remote end of said pitman 59 to the jigger board 22, while the conveyor belt 46 of the right side portion 3 of

the machine is shown driven, with its upper horizontal reach moving outwardly to the right over its rollers 48 and 47, by said motor 67, through the medium of part of the vibratory means (58) and a sprocket 55 of said vibratory means, through an endless chain 71 extending over said sprocket 55, sprockets 51 and an idler 52. Potatoes are then delivered from a grader [such as shown in Plaintiff's Interrogatory, Exs. 3-3] or otherwise onto the inner end of the upper reach of said endless conveyor belt 46, and said potatoes are conveyed outwardly by said belt on its upper reach, until said potatoes strike against the baffle plates or shearers 72 extending forwardly at an angle across the upper surface of said belt 46 of the side portion 3 of the machine, and said potatoes upon striking said baffle plates or shearers 72 are deflected laterally and forwardly thereby from said belt 46 over the front side edge of said belt, at the front of the machine, and the potatoes are thereby dropped from said front edge of said belt through the upper open ends of said sacks (34) into said sacks, respectively, supported on the right end portion of the platform or jigger board (22), at the front of said side portion 3 of the machine, and the potatoes, thus dropped into said sacks are "jiggled" and thereby settled and packed compactly in said sacks by the horizontal forward and backward movement of the platform or jigger board (22), which movement of the jigger board is produced by the motor 67 and interconnected mechanism, as aforesaid.

In the operation of the machine, the baffle plates or shearers 72 may be moved manually inwardly or out-

wardly on the rods 75 and 76 from one sack (34) to another as each sack is filled with potatoes, deflected from the belt 46 by the baffle plates or shearers 72, as above described.

When a sack (34) is filled with potatoes deflected by a baffle plate or shearers 72 from the belt 46, and said potatoes are settled and compacted in said sack by the vibratory means (58) and the platform or jigger board (22), the baffle plate or shearer 72 is then shifted along the belt 46 to an empty sack for filling and packing said sack as above described. The filled and packed sack is then disconnected at its upper end from its upper connecting frame unit 37 and said sack is then finally removed from the jigger board (22) and another empty sack is then substituted for said removed sack, and the above-described operations may be then repeated indefinitely.

Important Issue of This Rehearing Is Question of Infringement of Claim 1 of Appellant's Reissue Patent No. 22,740, Which Patent Was Declared Valid by Lower Court.

This rehearing has been materially shortened by excluding therefrom appellant's patent in suit before the lower court, No. 2,288,159, June 30, 1942, for Sacking Device, and by restricting this rehearing to the sole issue of *infringement of Claim 1* of appellant's Reissue Patent, No. Re. 22,740, April 2, 1946, for Sack Jigger, by the appellee's accused sack jigger machines, the lower court having declared appellant's said Reissue Patent No. Re. 22,740 valid [Tr. 17, 31 and 32].

Infringement of Appellant's Reissue Patent No. 22,740 Was Tried Primarily on Plaintiff's Interrogatories and Was Proved by Defendants' Answers to Said Interrogatories Admitting All Elements of Claim 1 of Said Patent, Which Elements Are Duplicated in Defendants' Accused Machine, Plaintiff's Exhibit No. 3-3.

Plaintiff's-Appellant's suit for infringement of his Reissue Patent No. Re. 22,740, for Sack Jigger, by the defendants-appellees, was based and tried upon Plaintiff's Interrogatories, Plaintiff's Exhibit 5, and infringement of Claim 1 of Plaintiff's said Reissue Patent, by the defendants, was fully proved at the trial by the Defendants' Answers to Plaintiff's Interrogatories IV, VI and XI, Plaintiff's Exhibit 6, which interrogatories were directed to the defendants'-appellees' Sack Jiggers, illustrated in the two photographs, Plaintiff's Interrogatory Exhibits 3-3. Defendants'-Appellees' Answers to Plaintiff's Interrogatories IV, VI and XI definitely admit that the defendants-appellees have made and sold Sack Jigger apparatus, as illustrated in said two photographs, Plaintiff Interrogatory Exhibits 3-3 prior to the filing of Plaintiff's-Appellant's action for infringement of his patent in suit Reissue No. Re. 22,740.

Claim 1 in Suit of Appellant's Patent Re. No. 22-740.

Claim 1 of Plaintiff's-Appellant's Patent, Reissue No. 22,740, on which claim this suit is brought, is reproduced here below with the reference numerals of the patent specification designating the elements of the invention in suit, appearing after said elements, respectively, in said claim, as follows:

"1. In a device for shaking containers and the like (34) to settle the contents thereof, a framework (1

to 11, inclusive), a platform (22) for supporting a plurality of containers (34), hinged means (23) supporting the platform from the framework, vibratory means (58) connected to the platform for shaking it and the containers supported thereby, said means including a pitman (59) adjacent the platform, coupling means (60) connecting the pitman with a portion of the platform, and rotary means (56) attached to the pitman for reciprocating it, said platform including an elongated surface (22') with container stations (28) from the ends thereof to a central open locus (1), said vibratory means (58) having its connection (60) with the platform at this central locus (1)."

In the claim, as above stated, certain elements are referred to in different, but equivalent terms of the patent specification. For example "containers" (34) of the claim are referred to as "sacks" 34 in the patent specification. "Vibratory means" (58) of the claim is referred to as a "jigger" in the specification. The numeral (22') does not appear in the specification and is supplied in the claim to distinguish the "elongated surface" of the platform (22) or "jigger board" as said platform is often called.

The reference numbers of the specification of the patent in suit, as applied to Claim 1 of said patent, as above set forth, are also shown applied to the parts or elements of Plaintiff's Exhibits 8, 3-3, 11c, 13 and 12A and models which formed a part of Appellants' Motion for Reconsideration of Petition for Rehearing, and are part of the record of the case.

Comparison of Elements of Patent Claim Sued on,
and Defendants' Accused Machines, Particularly
Plaintiff's Exhibit 3-3.

Every element of Plaintiff's-Appellant's above-stated Claim 1 of his patent in suit, Reissue No. 22,740, *is found* in Defendant's-Appellee's accused machines, and particularly in the two photographs of the defendant's-appellant's accused machine *Plaintiff's Interrogatory Exhibit 3-3*, and in plaintiff's working model of said accused machine, identified by the same exhibit number.

In a crude attempt to avoid infringement of Claim 1 of Appellant's Patent, Reissue No. 22,740, defendants-appellees resort to the completely discredited expedient of merely making an *integral* element in *two* parts in an accused machine, instead of in *one unitary* element, as illustrated in a patent sued on, *without changing the function, operation or result* of such patent including the *integral element* with only a *single part*.

"And infringement is not averted * * * by the separation of *one* integral part into *two*, the parts doing substantially what was done by the *single part*."

Walker on Patents, Vol. III (Deller's Ed), pp. 1698-1699, Sec. 462.

In the case at bar the feeble expedient resorted to by the defendants-appellees, to avoid infringement of Claim 1 of the patent in suit, amounts to nothing more than cutting the plaintiff's-appellant's *one* single and continuous platform or jigger board (22) into *two* platforms or

jigger boards (22) and connecting the inner ends of said *two* cut platforms or jigger boards (22) to the outer ends of two pitmen (59), respectively, at a central locus 1, the inner ends of both of said pitmen being connected to a jigger or vibratory means (58) which vibratory means, through said pitmen, vibrate said two cut jigger boards (22) for jiggling the potatoes. Such a slight and immaterial variation in the defendants'-appellees' accused machine, Plaintiff's Interrogatory Exhibits 3-3, does not change the function, operation and result of the defendants'-appellants' machine, Plaintiff's-Appellant's Interrogatory Exhibits 3-3, one iota, from the function and operation performed and the result accomplished by the plaintiff's-appellant's Sack Jigger machines as shown in Plaintiff's Exhibits 2 and 8.

Infringement of Claim 1 of the patent in suit, by the defendants-appellees, Plaintiff's Interrogatory Exhibit 3-3, not being averted by the defendants-appellees, in making their jigger board (22) in *two* parts, instead of *one* and their connection of said parts by *two* pitmen (59), respectively, to a vibratory means (58) instead of by *one* pitman (59), as covered by said patent Claim 1 in suit, complete infringement of said claim is otherwise established by the obvious *identity* of the *remaining elements* of the Defendants'-Appellees' Sack Jigger, Plaintiff's Interrogatory Exhibit 3-3, and model thereof, to the elements 34, 1 to 11, 22, 23, 58, 59, 60, 56, 22', 28 and 1 of Claim 1 of the patent in suit, Reissue No. 22,740.

Law Well Settled in This Circuit That Slight Changes of Form, Such as Making an Element in Two Parts, Instead of One, or Vice Versa, Does Not Avoid Infringement of Patent.

"In a suit for infringement of a fan, it is no departure from the patent to use a *blank of blades* instead of *single blades*, or a *two-piece* hub instead of a *one-piece* hub to accomplish the same result."

Samsom-United States Corp. v. Sears-Roebuck & Co., 103 F. 2d 312, (C. C. A. 2d, 1939), cert. den. 307 U. S. 638, 83 L. Ed. 1519 (1939).

"In infringement suit, separation in accused device of *one* unit into *two* parts, performing the same function in the same manner as a unit of the infringed structure, does not avoid infringement." (both U. S. C. A. and Sup. Ct. held Exhibits 5 and 7 infringements because of separation of *one* unit into two parts.)

Ace Patents Corp. v. Exhibit Supply Co., 119 F. 2d 349 (C. C. A. 7, 1941), mod. 315 U. S. 126, 86 L. Ed. 736 (1942).

"Infringement is not avoided by dividing an *integral element* of the patented machine into *two* or more distinct parts, so long as the function and operation remain substantially the same."

Kings County Raisin & Fruit Co., et al. v. United States Consol. Seeded Raisin Co., 182 Fed. 59 (C. C. A. 9);

Angelus Sanitary Can Mach. Co., et al. v. Wilson, et al., 7 F. 2d 314-319 (C. C. A. 9).

"Reissue patent No. 18,841, Claim 2, relating to Croquignole style of hair waving, was infringed, notwithstanding use of *one* clamp for *two* clamps disclosed in claim."

Johnson v. Philad., 96 F. 2d 442 (C. C. A. 9).

Addition of an Element to a Patent Claim Does Not Avoid Infringement of the Claim.

Defendants-appellees in dividing the platform (22) into *two* platforms (22) and connecting said *two* platforms, respectively, by *two* pitmen (59) instead of one, to a vibratory means (58) have not avoided infringement of Claim 1 of the patent in suit, because such an expedient *does not leave out* an element of said claim, but *adds another element* to the claim, to wit: a second platform (22).

“*Addition* to a patented machine or manufacture does not enable him who makes, uses or sells the patented thing with the addition, to avoid a charge of infringement.

* * * * *

“This is true even where the *added device facilitates the working* of one of the parts of the patented combination, and thus makes the latter perform its function with more excellence and greater speed.”

Walker on Patents (Deller’s Ed.), Vol. III, Sec. 460, pages 1693-1694.

“If an infringing device performs the same function as a patented device, *it is immaterial that it also performs some other function*. It is still, none the less *an equivalent of the patented device, and an appropriation of the patented invention*.”

Chesapeake & O. Ry. Co. v. Kaltenbach, 95 F. 2d 801 (C. C. A. 9, 1938).

“Where defendant in an infringement suit uses the principle and appropriates the *substance* of the *claim* in issue, the fact that it avoid the *letter* of the

claim by the addition of an unnecessary element does not prevent infringement."

B. B. Chemical Co. v. Ellis, 117 F. 2d 829 (C. C. A. 1, 1941), *aff'd* 314 U. S. 495, 86 L. Ed. 367 (1942).

Plaintiff's-appellant's case of infringement of Claim 1 of his patent in suit, Reissue No. 22,740, by the defendants'-appellees' accused sack jigger machines is conclusively proved by the Defendants' Answer to Plaintiff's Interrogatory XI [Pltf. Ex. 6] and by Finding of Fact XV, in which answer and finding defendants admit that they have made and sold an apparatus as shown in Plaintiff's Interrogatory Exhibits 3-3 (photographs) and as reproduced by the plaintiff's model designated by said exhibit number, as illustrative of the argument of plaintiff's counsel.

In the photograph of plaintiff's patented sack jigger machine, Plaintiff's Exhibit 8, defendants' sack jigger machine, Plaintiff's Interrogatory Exhibits 3-3 (photographs), and said Finding of Fact XV [Tr. p. 29], the parts or elements of Claim 1 of the patent in suit, Reissue No. 22,740, and the corresponding parts or elements in said Plaintiff's Exhibit 8, Plaintiff's Interrogatory Exhibits 3-3, Findings of Fact XV, and Plaintiff's Models of said Exhibits 8 and 3-3 are designated by the same reference numbers of the specification of said Claim 1 of said patent in suit, showing and proving conclusively that Defendants' Interrogatory Exhibits 3-3 contains all and the same elements of said Claim 1, and that defendants'-appellees' sack jigger machine shown in said Plaintiff's Exhibits 3-3 is in patent law a Chinese copy of and an infringement of Claim 1 of the patent in suit. Infringe-

ment of Claim 1 of the patent in suit by defendants' machine, Plaintiff's Interrogatory Exhibit 3-3, proves plaintiff's-appellant's charge of infringement, since it is only necessary to prove infringement of only *one* form of the defendants' accused machines to establish said charge of infringement of all infringing forms of the defendants' machines.

Western Electric Co. v. La Rue, 139 U. S. 601, 606, 11 S. Ct. 670, 35 L. Ed. 294.

Plaintiff's Interrogatory XI and Answer thereto are as follows:

“XI.

Interrogatory: Attached hereto and marked Plaintiff's Exhibit 3-3 is a photograph of a portion of one side of a sack jigger showing the mechanism for vibrating or jiggling the platform for supporting the sacks.

State whether you have made, used or sold a sack jigger, prior to the filing of this suit, containing the mechanism for vibrating or jiggling the platform for supporting the sacks, as shown in said Exhibit 3-3.

Answer: As nearly as can be determined by defendants from an examination of the two photographs, both marked *Exhibit 3*, attached to the interrogatories, the *defendants have made and sold an apparatus as illustrated therein.*”

The part of Finding of Fact XV admitting infringement of Claim 1 of plaintiff's-appellant's patent in suit, Reissue No. 22,740, is as follows:

“Each twin unit (1 and 2, or 1 and 3) comprises
* * * a plank, or platform (22) or table hingedly

(23) mounted upon the framework (1-11), this plank being suitable for the positioning thereon of a plurality of bags or other containers (34). A shaking means (58) is provided in the form of an electric motor driving an eccentric (56) which is coupled with a connecting strap (59), the opposite end of which is attached to the near end of the plank. The same motor (67) and eccentric (56) are utilized for powering two connecting straps 59 individually attached to adjacent ends of the planks (22) and consequently reciprocating both planks or platforms (22), illustrated in *Exhibits 3-3* attached to plaintiff's interrogatories which are plaintiff's Exhibit 5."

Defendants'-appellees' sack jigger machine, Plaintiff's Exhibit 11c (photograph) and Exhibit 13 (blueprint) [Tr. pp. 97-98] is the only sack jigger infringing machine of the defendants-appellees which was considered and incorrectly considered by the lower court [Decision, Tr. p. 20], but it is only *one* form of the infringing machines of the defendants-appellees, and while it [Pltf. Ex. 11c] evidently was designed to look as little like plaintiff's-appellant's patented machine as possible, all of the elements of Claim 1 of the patent in suit are obviously copied from said claim, and said accused machine, Plaintiffs' Exhibits 11c and 13, clearly infringes said Claim 1 of the patent in suit.

In the lower court's decision [Tr. pp. 20-21] the structure and operation of Plaintiff-Appellant's Sack Jigger, as embodied in Claim 1 of the patent in suit, Reissue No. 22,740, are grossly misstated by the lower court. For example the lower court [Tr. p. 20] says: "Element 1: Instead of a Pitman adjacent the platform, we find a cross bar [Exhibit 11c]; Element 2:

Instead of a central *open* locus, the accused device shows a board, not at center [Exhibit 11a]; Element 3: A rigid connection takes the place of one long board. (The jigger connection is at the end of the machine.)” Rationalization of such incoherent and senseless jargon is impossible. A cursory examination of Plaintiff’s Exhibit 11c clearly shows that there is a pitman adjacent the platform. The pitman is a long channel bar or beam, designated (59) on the near side of a thin partition and on the opposite or other side of said partition is mounted the platform or jigger board 22 close to said partition and as shown in Plaintiff’s Exhibit 13 (blueprint). Said pitman (59) is the most conspicuous element shown in Plaintiff’s Exhibit 11c, on the near side of said exhibit, and is spaced *horizontally forwardly of*, but *adjacent* the said *platform* (22) and partition at no greater distance than the pitman (59) is spaced *vertically above* but *adjacent* the *platform* (22), as shown in Fig. 1 of the patent sued on, Plaintiff’s Exhibit No. 2.

“Making rolls of a surface decorating machine *vertical* instead of *horizontal*, as in the prior art, is mere transportation of parts.”

Oxford General Motors, 120 F. 2d 44 (C. C. A. 6, 1941).

The so-called cross bar (60) of Exhibit 11c is certainly not a mere cross bar or a substitute for a *pitman* adjacent the platform (22), as the court incorrectly says that it finds, but said part(60) is pivoted at its near end to the frame post 8, and is connected at its far end to one end of the platform (22) which extends behind the longi-

tudinal partition of the frame of the machine, while the near end of an actual pitman (59) is pivotally connected to said part (60) between the ends thereof. As a matter of fact the part (60) of Plaintiff's Exhibit 11c, instead of being a cross bar, it is a *lever* of the *third class*, as any elementary text book on physics will show, and said lever is the *mechanical equivalent* of the bracket connection (60) of the patent in suit, between the pitman (59) and the platform or jigger board (22).

Examining Element 2 of the lower court's decision [Tr. p. 20], said court is incorrect in stating that Exhibit 11c, instead of a central open locus, shows a board, not at center [Ex. 11a]. Said statement does not make sense because it falsely implies that a board, not at center, eliminates the central open locus, which is shown at 1 at the extreme right of Exhibit 11c and at the center of Plaintiff's Exhibit 13. It is immaterial whether there is a central open locus or a board, not at center, because an *open locus* is only an *open place* and is not a tangible mechanical *element* of the claim in suit, which can affect the meaning of the claim, but is only any *open place* where a pitman should be connected to the platform or jigger board (22), to make the claim complete and operative. If the jigger board connection is removed to a non-central, or end locus, that is nothing but a transposition of parts which does not avoid infringement of the patent claim in suit.

Examining Element 3 of the lower court's decision [Tr. p. 20], that a rigid connection takes the place of

one long board, and that the jigger connection is at the end of the machine it is clear that the lower court does not understand the defendant's accused machine as shown in Plaintiff's Exhibits 11c and 13. The *rigid connection* of which the lower court speaks is evidently the long pitman 59, but it does not take the place of one long board or jigger board (22), which is shown at the rear of the partition in said Exhibit 11c, and is a separate and distinct element from said pitman. As for the jigger connection being at the end (or end locus), instead of a central locus of the machine that is also only transposition of parts and does not avoid infringement.

Referring to Plaintiff's Exhibit 12A, this accused defendant's machine is admitted by defendants in their Answer to Plaintiff's Interrogatory IV, Form 2. The motor and eccentric mechanism are located at *one extreme end* of the aligned platforms, which are connected at their inner ends by a *single connecting strap*, so that the aligned *platforms reciprocate as one platform*, like the single platform of appellant's patented machine. The connection of the jigger mechanism (58) to one *end* of the platform 22, instead of at a central open locus is nothing more than a transposition of parts which does not avoid infringement of the patent in suit.

Walker on Patents (Deller's Ed.), Vol. 3, p. 1699,
Sec. 463;

Bianchi v. Barili, 168 F. 2d 793 (C. C. A. 9,
1948).

Strong Proof of Infringement of Claim 1 of
Patent in Suit.

“To constitute infringement it is unnecessary to demonstrate substantial identity between machines to a mathematical certainty, but *infringement connotes correspondence as to the substantial dominant and essential elements.*”

Bianchi v. Barili, 184 F. 2d 793 (C. C. A. 9).

From the evidence a fair comparison of the defendants'-appellees' accused machines, with Claim 1 of plaintiff's-appellant's patent in suit Reissue No. 22,740, there will definitely be found *a clear correspondence of the substantial, dominant and essential elements* of said accused machines, to the same elements of Claim of said patent in suit, *which correspondence connotes infringement of said Claim 1* of appellees' Reissue Patent No. 22,740.

Defendants' answer to Interrogatories IV, VI and XI admit that they have made and sold a sack jigger machine that *performed the same function in substantially the same way to obtain substantially the same result* as that of appellant's invention, covered by Claim 1 of the patent in suit, Re. No. 22,740, which answers to said interrogatories are supported by the plaintiff's models of Plaintiff's Exhibits 3-3, 8 and 11c, and which models are adopted merely as a part of our argument.

“Appellee's ‘cover’ and appellant's ‘cage’ *perform substantially the same function in substantially the same way to obtain substantially the same result.* That they are called by different names is immaterial. *Bates v. Coe*, 98 U. S. 31, 42, 25 L. Ed. 68.”

Reinharts, Inc. v. Caterpillar Tractor Co., 85 F. 2d 628, at 631 (C. C. A. 9).

Judgment of Lower Court Is Contrary to the Evidence.

Finding of Fact XV [Tr. p. 29] supports the defendants' answers to Plaintiff's Interrogatories IV, VI and XI, which answers admit that the defendants' accused machines contain *every element* contained in the Claim 1 sued on of the patent in suit, Re. No. 22,740, and *correspondence of the substantial, dominant and essential elements of the defendants' accused machines, to those elements of Claim 1 of the patent in suit, connotes infringement by the defendants-appellees of said Claim 1 of the plaintiff's-appellant's patent in suit, Reissue No. 22,740*, as established by this Honorable Court in *Bianchi v. Barili, supra*. Infringement by the defendants-appellees is clearly established by Finding of Fact XV because said finding is supported by the evidence, and particularly by the defendants' answers to Plaintiff's Interrogatories IV, VI and XI, which answers of the defendants are *under oath*. The judgment of the lower court should have conformed to said Finding of Fact XV.

Finding of Fact XVII on the other hand denies all of the facts, which are overwhelmingly proved by the evidence, and flies in the face of Finding XV, and said *Finding of Fact XVII is contrary to the evidence, and is the only basis for the judgment of the lower court in the case at bar*. Finding of Fact XVII, being a *false finding*, the judgment of the lower court, based solely on said finding, is a *false judgment*, and should be reversed by this Honorable Court.

Finding of Fact XVII and the judgment based thereon violates Rule 52 (F. R. C. P.) in that said judgment is *not an appropriate judgment* according to said rule, be-

cause it is based on the *false Finding XVII*, and not on the *true Finding of Fact XV*, which *finds infringement* of the patent in suit by the defendants-appellees *in conformity with the evidence of the case*.

Violation of a rule of the F. R. C. P. by a District Court judge has been disapproved by the Supreme Court. In *McCullough et al. v. Hon. George Cosgrave*, 309 U. S. 634, 84 L. Ed. 992, the Supreme Court issued a mandamus requiring said judge to vacate his order under Rule 53(b) and appoint a judge, instead of a master, to hear a case.

In the case of *Los Angeles Brush Mfg. Co. v. James*, 272 U. S. 701, 47 S. Ct. 286, 71 L. Ed. 481, at 483, the Supreme Court said:

“We shall therefore deny leave to file this petition, but are content to state our views on the general subject, with confidence that the district judges will be advised *how important we think these two rules are*, and that we intend, so far as lies in our power, to make them reasonably effective for the purpose had in view of their adoption.”

Ernst Patent Claim 1 Not Narrowed by Prior Art.

Defendants-appellees set up certain prior art paper patents to narrow the scope of the Claim 1 sued on of the patent in suit, but said paper patents were never used, or ever used for sacking potatoes like appellant's potato sacking machine.

Appellees praise the prior art which they have never attempted to use, but have used the appellant's invention and infringed the appellant's patent.

Diamond Rubber Co. v. Consol. Rubber Co., 220 U. S. 428, 441.

Conclusion.

Wherefore, appellant requests that the judgment of the District Court be reversed, as to the question of infringement of Claim 1 of the patent in suit, Reissue No. 22,740, and that justice be done in the premises.

Respectfully submitted,

ALAN FRANKLIN,

Attorney for Appellant.

J. CALVIN BROWN,

Of Counsel.

Certificate of Counsel.

I hereby certify that I am one of the counsel for the appellant, and that in my judgment the foregoing brief is well founded and that it is not interposed for delay.

ALAN FRANKLIN.